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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79

CLARENCE G. KUNSMAN,

Appellant

vs.

MAX FACTOR & CO., AND SALES BUILDERS, INC.,

Appellees.

APPELLEES' BRIEF.

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CLARENCE G. KUNSMAN,

Appellant

vs.

MAX FACTOR & CO., AND SALES BUILDERS, INC.,

Appellees.

APPELLEES' BRIEF.

This case attacks the constitutionality of Section 1½ of the so-called Fair Trade Act of the State of California.[1] The ground is that it violates the Fourteenth Amendment of the Federal Constitution, because it is asserted that this section deprives appellant of his liberty and property without due process of law. The assignments of error are directed to Section 1½ only.[2]

The Supreme Court of California held, as applied to the facts of this case, that Section 1½ is constitutional. The court took for granted the validity of all other parts of the act except 1½, saying that the appeal before them presented "the single question: 'Is Section 1½ added to the Fair Trade Act of the State of California in 1933 (Stats. 1933, p. 793, *supra*), constitutional?'", and answered the question "yes." (*Max Factor* v. *Kunsman,* R. 24, 5 Cal. (2) 446, 55 Pac. (2) 177.)

[1] This section was added in 1933 (Stats. 1933, p. 793; Deering's Gen. Laws, Act 8782) to the Act as passed in 1931 (Stats. 1931, p. 583; Deering's Gen. Laws, Act 8782).

[2] R. 58, 59. See also R. 56, Appellant's Statement of Jurisdiction, pages 5, 6 and Appellant's brief, page 12.

We assume that the validity of any legislation is to be determined with reference to the facts of the case in which it is invoked, and without consideration of hypothetical cases with different facts. The situation here before the court is specific and concrete.

The Statute in Question.

The statute as passed in 1931 reads:

An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name.

The People of the State of California do enact as follows:

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deterio-

rated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

SEC. 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

SEC. 3. The following terms, as used in this act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

SEC. 4. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

SEC. 5. This Act may be known and cited as the "Fair trade act."

Approved May 8, 1931
Effective August 14, 1931

The amendment passed in 1933 reads:

An Act to add a new section to the "Fair Trade Act" to be number 1½, relating to unfair competition.

The People of the State of California do enact as follows:

SECTION 1. A new section is hereby added to the "Fair Trade Act" to be numbered 1½ and to read as follows:

SEC. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Approved, May 8, 1933
Effective, August 21, 1933

I.

Statement of Facts.

This suit was instituted in the Superior Court of California, Los Angeles County. It was decided on a general demurrer to the complaint (R. 21) that "said amended complaint does not state facts sufficient to constitute a cause of action." The demurrer was sustained without leave to amend (R. 22). The Supreme Court of California reversed (R. 24). Defendant electing to stand on his demurrer, the trial court was ordered to enter judgment as prayed in the complaint (R. 54).

Plaintiffs were Max Factor & Co., a Delaware corporation and Sales Builders, Inc., a Nevada corporation. Max Factor & Co. are manufacturers of cosmetics under trade marks owned by them and registered in the Patent Office; Sales Builders, Inc., is the exclusive distributor of the Factor products. The defendant, under the name of Wilshire Drug Co., owns and operates a retail drug store at No. 8802 Wilshire Boulevard, Beverly Hills, California.[3]

The complaint alleges (R. 7):

> "That many years ago there developed in the drug trade a practice of cutting prices, both wholesale and retail, of well advertised commodities, well known to the public and sold and identified under distinctive trade marks, brands and names. That such products were offered by retail dealers at prices conspicuously lower than the marked or established prices of said commodities as so-called

[3] The complaint, according to the California practice, joined several "John Doe" defendants, which accounts for the use of the plural in its allegations.

'leaders' for the purpose of creating the impression that other goods, of which the prices were not well known, were sold at corresponding reductions, and that all articles dealt in by a particular dealer were sold by him at less than they could be obtained elsewhere. That the stores at which said practices were prevalent became known as 'Cut Rate Drug Stores.' That said practice of cutting known and established prices engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut produced another in retaliation, so that ultimately in a particular community well known articles identified by trade-marks, brands and names with an established price were offered at prices cut to a point which yielded no profit, and in many cases represented a loss. That said price cutting resulted in the destruction of all incentive on the part of dealers to sell such commodities and in their declining to handle or stock the same, and caused said dealers, when said commodities were called for by the public, to sell the same reluctantly, or to substitute, where possible, other products upon which profit could be made. That as a further result of said price cutting, the producer or owner of such identified merchandise whose goods had been handled in this manner, through no fault of his own, was deprived of a market and facilities for distribution, and his business and good-will seriously interfered with and in many cases destroyed. That the situation above described is particularly true in the state of California with respect to cosmetics and toilet articles, and extended gradually to other lines of merchandise. That to remedy this evil the Legislature of the state of California passed an act entitled 'An Act to Protect Trade-mark Owners, Distributors and the Public against Injuries [injurious] and Uneconomic Practices in the Distribution of Articles of Standard Quality under a Distinguished Trade-mark, Brand or Name.' Said

> act was approved on May 8, 1931, became effective August 14, 1931, is known as the 'Fair Trade Act,' and is chapter 278 of the Statutes of California of 1931. That the said 'Fair Trade Act' was amended by the Legislature of the state of California, which amendments were approved on May 8, 1933, and became effective August 21, 1933."

The complaint then states (R. 8) that on August 21, 1933, plaintiff Sales Builders, Inc., to protect its trade in the State of California, in trade-marked goods, and to protect itself against the injurious and uneconomic practices contemplated by the Fair Trade Act and to avail itself of the terms of such act, adopted a system of doing business by which written contracts were entered into between the plaintiff and its wholesale or jobbing distributors and between the plaintiff and retail druggists or other persons selling the Factor products within the State of California. Such contracts obligate the wholesale and jobbing distributors to sell the Factor products only to retailers who had entered into written contracts to sell Factor products at prices specified in them. Specimens of the contracts are attached to the complaint as Exhibits A and B (R. 14-19). The complaint alleges (R. 8, 9):

> "That the prices fixed and established by plaintiff, Sales Builders, Inc., in said contracts are fair and reasonable, and no higher than is required to yield to distributors at wholesale and retail a reasonable compensation for their services. That the goods sold by plaintiff, Sales Builders, Inc., are commodities within the terms of the 'Fair Trade Act' and bear the trade-marks, brands or names of the said plaintiff Max Factor & Co., as hereinbefore set forth, and are in fair and open competition with commodities of the same general class produced by others."

The complaint further alleges (R. 9) that practically

all of the wholesale druggists in the State of California have executed the wholesale contracts and that practically all of the retail druggists in the State of California have executed the retail contracts and that included among the retailers are the prominent department stores dealing in cosmetics and toilet articles;

> "That the said wholesale and retail druggists are observing and conforming with the terms of the said contracts and price cutting on plaintiff, Max Factor & Co., products has ceased, and, except as hereinafter stated, plaintiff, Sales Builders, Inc., is now enjoying, under the terms of the 'California Fair Trade Act,' a reasonable profit in the sale of its goods and immunity from destructive and uneconomic price cutting, the distribution of its goods has been unobstructed, and its business has been greatly benefited. That the wholesale and retail dealers in said commodities, by reason of such contracts, are obtaining a reasonable compensation and profit on the sale of preparations distributed by plaintiff, Sales Builders, Inc., and they and plaintiff, Sales Builders, Inc., have enjoyed and are continuing to enjoy freedom from price cutting and unfair competition, except as hereinafter set forth."

The complaint then alleges that plaintiff Sales Builders, Inc., has refused and will refuse to sell Factor products to any and all wholesalers and retailers who have not entered into the contracts referred to (R. 9).

The complaint continues (R. 10):

> "That defendants, before the inauguration of the method of doing business by the contracts hereinbefore described, were retail distributors of plaintiffs' goods and made a pretense of selling such goods at prices conspicuously lower than other retail dealers in the state of California, in

> many instances at less than the cost of said commodities, to defendants, with the result that other dealers were forced to meet defendants' price competition by offering plaintiffs' goods for sale at prices competitive with those quoted by defendants."

Upon the adoption of plaintiffs' system of contracts, a contract (Exhibit B) was tendered to the defendants and an opportunity given them to deal in the plaintiffs' goods on the same terms offered to every other retail druggist in the State of California; that defendants declined to execute said contracts or to conform to the system of distribution adopted by plaintiff or to observe the prices fixed in the contracts; that since the establishment by the plaintiff of its system of contracts, the defendants have repeatedly been requested to enter into a retail contract with the plaintiff but defendants have repeatedly refused to do so; that upon defendants' refusal to enter into such contracts plaintiff has declined and has continued to decline to sell its products to the defendants unless and until they enter into a contract (R. 10).

When plaintiff declined to sell its commodities to the defendants except as aforesaid, defendants, who had full knowledge of the system of contracts adopted by the plaintiffs and of the fact that substantially all wholesale and retail dealers in the State of California had executed such contracts and were operating in conformity with its terms,

> "conceived a wrongful and unlawful plan and scheme of harming, injuring and destroying plaintiff, Sales Builders, Inc.'s, said business and good will in the state of California by disrupting said system of lawful contracts existing between said plaintiff, Sales Builders, Inc., on the one hand, and its wholesale and retail distributors on the

other. That defendants have proceeded and are proceeding to carry out said unlawful and wrongful scheme and plan in the manner more particularly hereinafter set out, and in so doing have been and now are acting maliciously and without legal justification therefor." (R. 10, 11.)

The complaint then alleges that in pursuance and as a part of said unlawful and wrongful plan or scheme, defendants have procured and now procure Factor commodities bearing its trade marks, brands and names, unbeknown (*sic*) to the plaintiffs and have continually sold and are now selling them at prices less than the retail prices described in the retail contract and which prices are observed by substantially all the retail dealers in cosmetics and toilet articles in the State of California; that the defendants' prices are 69 cents for $1.00 items, 43 cents for 50 cent items and 29 cents for 50 cent items, the resale price of which, as set forth in the contracts, is $1.00 and 50 cents, respectively, and prices for other items are at a proportionate reduction.

The complaint asserts:

"That the plaintiff, Sales Builders, Inc., is informed and believes and therefore alleges that the cost to defendants of the said plaintiff, Max Factor & Co. products so sold by the said defendants is greater than the cost to the said defendants would be under a contract with the plaintiff, Sales Builders, Inc., as aforesaid." (R. 11).

It is alleged that defendants are engaged in informing retail dealers under contract with plaintiff, as well as the public generally of their intention to sell plaintiff's goods at the aforesaid cut rates (R. 11). Formal written notice was received by the defendants on August 25, 1933, that the plaintiff was operating its system of business under the terms of the Fair Trade

Act and a contract was tendered to the defendants (R. 12, 20). Since receipt of this notice, defendants have continued to cut prices to 69 cents for $1.00 items, 43 and 29 cents for 50 cent items (R. 13).

The injury to the plaintiffs by the defendants' conduct is set out in the complaint (R. 12) as follows:

> "That the said acts of the defendants hereinbefore alleged are unlawful and unduly influencing the retail and wholesale distributors of plaintiff, Max Factor & Co., products, and the said wholesale and retail distributors have complained that they will be compelled to cancel the contracts with plaintiff, Sales Builders, Inc., hereinabove referred to, and to sell the said Max Factor products not in conformity with the terms of said contracts, but at prices which will meet those announced by the said defendants, and at which prices the said defendants sell at retail the said plaintiff, Max Factor & Co., products, the result of which will be a destruction of plaintiffs' businesses and the good will pertaining thereto. That unless the relief herein prayed for is granted the plaintiffs the said cancellations by the said wholesale and retail distributors will take place, and a large number, if not all of the lawful contracts of plaintiff, Sales Builders, Inc., will be cancelled by the said wholesale and retail distributors, who are now parties to the said contracts, and the destructive price cutting in force before said contracts were entered into will be resumed with the result that destructive and predatory price cutting of plaintiff, Max Factor & Co., products will then prevail, distribution of said goods will be obstructed, and plaintiffs' businesses and the good will pertaining thereto will be injured, if not wholly destroyed, and in addition thereto the wholesale and retail distributors will be prevented from obtaining and earning a reasonable profit in the sale and distribution of the said plaintiff, Max Factor & Co., products."

The relief asked (R. 14) is that defendants be enjoined from selling, advertising or offering for sale any of the commodities distributed by the plaintiff in the State of California or any commodity bearing any of the trade marks, brands or names of the plaintiff Max Factor & Co., at prices less than the resale prices prescribed in the contract (Exhibit B) or, in the alternative, that the defendants be restrained and enjoined from selling any of the commodities and from advertising and offering any of such commodities for sale. There is also a prayer for general relief.

It is apparent from the foregoing facts which the general demurrer admits, that the plaintiffs are conducting their business in California under a system of contracts expressly authorized by the statutes of that State, that these contracts have been entered into with substantially all dealers in the State of California, that defendants, with full knowledge, and despite plaintiffs' protests, have purposely and without legal justification interfered with this lawful system of doing business and that their interference will destroy it by forcing parties to the plaintiffs' contracts to cancel them, thus obstructing the distribution of plaintiffs' goods and injuring plaintiffs' good will.

II.

Summary of Argument.

As enacted in 1931, the California Fair Trade Act permits contracts which stipulate resale prices provided that: (1) Such contracts relate to commodities identified by trademarks, brands or names; (2) such commodities are in fair and open competition with commodities of the same general class produced by others; and (3) such contracts are not made between competitors. This was no more than a codification of the existing common law of the state.

The only question before this Court is whether the 1933 amendment, Section 1½, as applied to the facts in this case, violates the Fourteenth Amendment of the Federal Constitution. Defendant's claim that it does, proceeds from a misconception of the nature and purpose of the statute. Section 1½ simply confers jurisdiction upon the civil courts of the state to provide relief against acts which damage property rights in trademarks and undermine lawful contracts.

Trademarks owe their existence to state law. Section 1½ protects the owners of trademarks against practices which may impair if not destroy them. It is a valid exercise of the power of the California legislature in securing and protecting property rights in intangibles which the law of California created.

Section 1½ is also a specification of acts of unfair competition, essentially a subject of state control.

It is also within the power of a state legislature to protect contract rights. Section 1½ by permitting relief against intentional interference with rights de-

rived from the lawful contracts provided by other sections of the Fair Trade Act is a valid exercise of state power.

The section, which defendant assails as depriving him of liberty and property without due process, is not regulatory. It does no more than to declare that acts knowingly done, which result in damage, shall be actionable in a civil proceeding.

The validity of Section 1½ is indicated by its integration with the common law doctrine which makes actionable third-party interference with contract relations, by its analogy to equitable servitudes and by its consistency with the development of the common law of unfair competition.

Tested in the light of these considerations and supported by the presumption of constitutionality particularly applicable to statutes dealing with matters of economic policy, Section 1½ is reasonable and has a substantial relation to the end sought by the California legislature. It does not, therefore, violate any provision of the Fourteenth Amendment to the Constitution of the United States.

III.

ARGUMENT.

(1) Price maintenance contracts of the character before the court in this case are valid under both the statutory and common law of the State of California.

The first expression by the Supreme Court of California as to the validity of contracts stipulating the prices at which the buyer should resell was in *Grogan* v. *Chaffee,* 156 Cal. 611, 105 Pac. 745, decided in 1909. In that case, the manufacturer of a pure olive oil had sold quantities of the product to a retail grocer pursuant to a contract by which the latter agreed to resell at specified prices. The olive oil was identified by copyrighted designs placed on every bottle and package. Reversing the action of the trial court, which had sustained a demurrer without leave to amend, the California Supreme Court declared:

> "In support of the ruling sustaining the demurrer it is urged that the contract relied on by plaintiff is unenforceable as being in restraint of trade.
>
> "We have here no question of an attempted monopoly. 'A monopoly exists where all, or so nearly all, of an article of trade or commerce within a community or district, is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such control to the exclusion of competition of free traffic therein.' *Herriman* v. *Menzies,* 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. * * * The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large proportion, of the olive oil manufactured or sold in the

market supplied by plaintiff. While plaintiff alleges that he manufactures oil by a process of his own discovery, there is nothing exclusive in the product resulting from this process. All that he claims for his oil is that it is pure and wholesome. The court must assume, as a matter of common knowledge, that others may and do manufacture pure olive oil in considerable quantities.

"Under these circumstances we see no reason why the contract alleged by plaintiff should not, as between the parties to it, be held to be valid. It violates no canon of public policy. By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. The producer was, in the first instance, under no obligation to sell his oil, and when he did sell it had the right to exact, as part of the consideration for the sale, a promise by the purchaser that he would not sell it at less than a stipulated price. There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his products may have attained."

Three years later, the California Supreme Court reached the same conclusion in *D. Ghirardelli Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041, involving a slightly different set of facts. The defendants in this case had purchased Ghirardelli's Ground Chocolate from a wholesale dealer, with whom the defendants had agreed to maintain resale prices specified by the manufacturer. In sustaining an injunction decreed by the trial court, the California Supreme Court held that the agreement between the wholesaler and retailer might properly be construed as one made for the benefit of a third person, the plaintiff manufacturer. The court also decided that

the contract was not in violation of the state anti-trust law as amended subsequent to the Grogan case.

The California Fair Trade Act, as passed in 1931, was held by the Court below to be merely a restatement of the rule of the Grogan and Ghirardelli cases (R. 38).

> "Another important factor that must be kept in mind is that in so far as the Fair Trade Act permits the producer to fix the resale price of his product by contract, the act merely embodies a rule of law well settled in this state. In *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745, and in *D. Ghirardelli Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041, it was held that as far as articles in intrastate commerce are concerned, without statutory authorization the manufacturer, by contract with a retailer, may fix the resale price. The Fair Trade Act as passed in 1931 merely codifies the rule of those cases, which was partially changed by the Cartwright Act * * *."

The California Fair Trade Act is limited to trade marked goods sold in free competition with other goods[4] of the same class; it does not embrace bulk commodities. Contracts between producers and between distributors are not allowed. There cannot be any horizontal contracts. They must be vertical from the pro-

[4] This court has taken notice of the difference between branded and unbranded commodities. In *Borden's Farm Products Co., Inc.* v. *Ten Eyck*, 297 U. S. 251 (Feb. 10, 1936), the court permitted a price differential under the New York Milk Control Law in favor of milk dealers not having a "well-advertised trade name." In *Sugar Institute* v. *U. S.*, 297 U. S. 553, 600, passing upon phases of price-fixing and restraint of trade relating to sugar, the court said:

> "Another outstanding fact is that defendants' product is a thoroughly standardized commodity. In their competition price, rather than brand, is generally the vital consideration."

ducer down, not among producers, not among wholesalers, not among retailers.

The act does not fix prices or require that prices be fixed. It does not regulate anything or anybody. It is permissive only. It allows a single producer, if he chooses to do so, to make contracts with distributors of goods identified as coming from him, if they wish to enter into such contracts with him, establishing, on the producer's identified merchandise, minimum resale prices, to the end that the producer may protect his distribution by insuring a profit to his distributors and safeguard his good will by keeping his merchandise from deceptive use such as "loss leader" and "bait selling" and thus cheapening it in public estimation.

The California Fair Trade Act embodies the idea that such "loss leader" or "bait" selling is a bad thing. While a particular loss leader or bait item may be a bargain, the ordinary customer does not benefit by it because the price cutter knows the frailties of human nature. His primary purpose is to get customers into the store by advertising well-known articles of recognized value at "bargain prices." He knows that a customer lured into his store in pursuit of a spectacular bargain will probably yield to the blandishments of a high-powered salesman and be persuaded to buy something in addition to the bargain, or instead of the bargain, to accept something "just as good." The cutter will gladly lose five cents profit on a tube of Ipana tooth paste, if he can sell for thirty-five cents a tooth brush of an unknown make worth ten. The only way the consumer can benefit by these "bargains" is to buy them and *buy nothing else*. Few people are resolute enough to do this. They are persuaded by the obvious bargain price on the leader, into the belief that other things whose values are not known, are equally cheap.

Here is where the price cutter comes out ahead. In pricing unknown goods high, he recoups the sacrifice in selling known goods low. The fact that cut rate stores exist is proof that they make money.

The whole situation recalls Mr. Justice McKenna's observations in *Rast* v. *Van Deman & Lewis Company*, 240 U. S. 342, 365, which was a suit brought to restrain the enforcement of a Florida statute imposing special license taxes on merchants using profit-sharing coupons and trading stamps. He said:

> "The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make. Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion."

The economic policy of authorizing contracts establishing minimum resale prices of goods identified by trade marks, made and sold in open competition with other goods of the same class, has been much debated. There are widely differing views. It is primarily an economic question. The State of California has taken the position that unrestrained price competition in identified merchandise and "bait" and "leader" selling are not desirable. It has decided that the way to prevent what is described as "injurious and uneconomic practices," is by permitting contracts to be

made fixing minimum resale prices[5] and to protect these contracts by making interference with their operation civilly actionable if it results in damage.

There is nothing novel in this policy. Contracts establishing resale prices were valid in California and elsewhere before the enactment of the so-called fair trade acts—in California,[6] in England,[7] and in several states.[8] Indeed, as far as this case is concerned, defendant does not question the validity of the contracts but assails only Section 1½ of the act, which gives a right of action to anyone who may be damaged by interference with them.

There are strong intimations by this court that national legislation authorizing price maintenance contracts would be valid. In *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 25, Chief Justice White said:

> "Moreover, so far as the argument proceeds upon the assumption of the grave disaster which must come to the holders of patent rights and arti-

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[5] In an appendix to this brief is a discussion of the historical and economic aspects of this question.

[6] *Grogan* v. *Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909); *D. Ghirardelli Co.* v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (1912).

[7] *Palmolive Co., Ltd.* v. *Freedman*, (1928) 1 Ch. 264, 76 U. of Pa. Law Review 1006; *Elliman, Sons & Co. Ltd.* v. *Carrington & Son, Ltd.* (1901) 2 Ch. 275.

[8] *Fisher Flouring Mills Co.* v. *Swanson*, 76 Wash. 649, 137 Pac. 144 (1913); *Clark* v. *Frank*, 17 Mo. App. 602 (1885); *Garst* v. *Harris*, 177 Mass. 72, 58 N. E. 174 (1900); *Garst* v. *Charles*, 187 Mass. 144, 72 N. E. 839 (1905); *Marsich* v. *Eastman Kodak Co.*, 244 App. Div. 295, 279 N. Y. Supp. 140 (2d Dept. 1935), aff'd per curiam, 200 N. E. 27; *Seagram* v. *Old Dearborn*, 363 Ill. 610, 2 N. E. (2) 940.

The Court of Appeals of New York in *Doubleday Doran* v. *Macy*, 269 N. Y. 272, 199 N. E. 409, sustained the validity of all sections of the corresponding New York Statute except the counterpart of Section 1½ of the California Act.

cles made under them from the future application of the doctrine which the cases establish, it must be apparent that if the forebodings are real the remedy for them is to be found, not in an attempt judicially to correct doctrines which by reiterated decisions have become conclusively fixed, but in invoking the curative power of legislation."

Mr. Justice Brandeis concurring said (27):

"Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles. On that question I have expressed elsewhere views which differ apparently from those entertained by a majority of my brethren. I concur, however, in the answers given herein to all the questions certified; because I consider that the series of cases referred to in the opinion settles the law for this court. If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress or relief may possibly be given by the Federal Trade Commission which has also been applied to."

In *Dr. Miles Medical Co.* v. *Park,* 220 U. S. 373, 405, there is a similar intimation that the right to establish resale prices can be given by statute. Mr. Justice Hughes saying:

"Nor can the manufacturer by rule and notice, *in the absence of contract or statutory right,* even though the restriction be known to purchasers, fix prices for future sales." (Emphasis ours.)

See also the observations of Mr. Justice Brandeis in *International News Service* v. *Associated Press,* 248

U. S. 215, 262. His conclusion was that the legislature is better fitted to meet such problems than the courts.

The State of California adopted this course in enacting the statute here involved, authorizing the establishment of resale prices within that state. There can be no doubt of its competency in this respect. If contracts such as this legislation authorizes may be declared illegal (and Federal and many State anti-trust laws so declare them) it seems irrational to say that they cannot be declared legal. Public policy is not an unvarying thing. As public policy changed, the old statutes against engrossing and forestalling were repealed "upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade."[9] In short as economic conditions change, ideas of public policy change.[10] The public policy of California as expressed in this statute did not change the law as it previously existed in that State but even if it did, a state may freely alter, amend or abolish the common law within its jurisdiction. *B. & O. Railroad* v. *Baugh,* 149 U. S. 368, 378: "There is no question as to the power of the States to legislate and change the rules of the common law * * *."

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association,* 276 U. S. 71, 89, Mr. Justice McReynolds said:

> "Section one presents no Federal question. It does not mention the Constitution or any statute of the United States, but claims that the Association is an unlawful trust or combination under common law rules. But the present controversy

[9] *Standard Oil Co.* v. *U. S.,* 221 U. S. 1, 55.

[10] Id. 58, 59.

concerns a statute and a State may freely alter, amend or abolish the common law within its jurisdiction.

* * *

"Certainly the statute impaired no right of the Warehouse Company guaranteed by the Fourteenth Amendment by merely authorizing corporations with membership limited to agriculturists and permitting contracts for purchase and resale of farm products. This also is true of the declaration that such associations shall not be deemed monopolies, combinations or conspiracies in restraint of trade, and that contracts with members shall not be illegal. The state may declare its own policy as to such matters."

(2) Section 1½ of the California Fair Trade Act does not deprive any one of liberty or property without due process.

Coming now to the validity of Section 1½ which is the only question, as it seems to us, that this court is called upon to decide; this Section reads as follows:

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

(a) **Section 1½ is a proper protection to trade marks and within the power of the state to enact to secure to the owners within the state their trade mark property. Trade marks are an intangible right independent of the property in the physical things to which they are affixed and owe their existence to state law.**

The purpose of the act as expressed in its title is to "protect trade mark owners * * * against injurious and uneconomic practices, etc." A trade mark is an intangible property right which the owner does not part with when he sells goods to which the mark may be affixed. As this court said in *Bourjois* v. *Katzel,* 260 U. S. 689, 692, "Ownership of the goods does not carry the right to sell them with a specific mark."

Trade mark protection is peculiarly within the province of the several States since the right to a trade mark itself is entirely dependent on state law. Trade marks owe their very existence to the laws of the states. This proposition has been well established for many years. In *Trade-Mark Cases,* 100 U. S. 82, Mr. Justice Miller said (93):

> "* * * the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection * * *."

In *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 424, Mr. Justice Holmes said:

> "But I think it necessary to go farther even on the assumption that we are dealing with the question of trade-marks in the several States only so far as commerce among the States is not concerned. The question before us, on that assumption, is a question of state law, since the rights that we are considering are conferred by the sovereignty of the State in which they are ac-

quired. This seems to be too obvious to need the citation of authority, but it is a necessary corollary of the *Trade Mark Cases,* 100 U. S. 82. Those cases decided that Congress cannot deal with trade-marks as used in commerce wholly between citizens of the same State. It follows that the States can deal with them, as in fact they sometimes do by statute, Mass. Rev. Laws, c. 72, §§ 2, 3, and when not by statute by their common law."[11]

[11] There have been statutes to protect trade marks in the several states for many years. In 1845 such a law was enacted in New York. State laws under different titles but all for the protection of trade marks were passed in Pennsylvania and Connecticut in 1847, Massachusetts in 1850, Ohio in 1859, Iowa 1860, Michigan 1863, Oregon 1864, Nevada 1865, Kansas, Maine and Missouri, 1866. Beginning in 1890, as a result of a controversy over the blue label of the Cigar Makers' International Union (*Schneider* v. *Williams,* 44 N. J. Eq. 391), statutes were passed in a large number of the states, authorizing the registration in the Office of the Secretary of State of labels, trade marks, terms, designs, devices or forms of advertisement, making infringement a misdemeanor and providing civil remedies.

At present there are statutes protecting trade marks in the following forty-five states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and in the territories of Alaska and Hawaii.

Complete texts of these acts are in Hopkins on Trademarks, Tradenames and Unfair Competition (Fourth Edition, 1924), Part II, Section F, beginning on page 620, which was complete up to the date of publication. There is also an abstract of the trade mark statutes of the several states in Shoemaker's Trade Marks (1931) page 1028 and following.

Many state statutes declare that the use or display of the genuine trade mark in any manner not authorized by the owner is actionable.

In *United Drug Company* v. *Theodore* [illegible]*anus Company,* 248 U. S. 90, 99, Mr. Justice Pitne[illegible]d:

> "There was nothing to prevent the [illegible]te of Kentucky (saving, of course, what Cong[illegible] might do within the range of its authority) [illegible] conferring affirmative rights upon Recta[illegible] exclusive in that Commonwealth as aga[illegible] others whose use of the trade-mark there [illegible] at a later time than his; * * *"

If, as these cases hold, a state which c[illegible]s trade mark property may protect it against t[illegible]ong of imitation, why cannot the state equally [illegible]tect the trade mark owner against other acts whi[illegible]pair the value of his trade mark and may destroy [illegible] The sale of trade marked goods at cut prices is re[illegible]zed as an injurious practice. Persistent price [illegible]g is as destructive of trade mark property as [illegible]lesale infringement. It cheapens the goods in [illegible]c estimation and thus disparages the good will [illegible] the trade mark symbolizes.

The willingness of the public to pa[illegible]enchanced price for reputable identified goods is [illegible]of the advantages which results from the owner[illegible]f an established trade mark.

This was pointed out in *McLean* v[illegible]*ing,* 96 U. S. 245, 251, where Mr. Justice Clifford[illegible]rked that if a manufacturer

> "has obtained celebrity in his m[illegible]cture, he is entitled to all the advantages [illegible]t celebrity, whether resulting from the grea[illegible]mand for his goods or from the higher price [illegible]blic are willing to give for the article * * *"

It cannot be doubted that the le[illegible]re of a state has the power to pass laws to pr[illegible]e owners of trade marks or other property a[illegible]respasses, if the legislation adopted is reasona[illegible]signed to accomplish that end and is not arbit[illegible] Trade marks

are property. As Mr. Justice Holmes said in *Beech-Nut Packing Company* v. *P. Lorillard Company,* 273 U. S. 629, 632:

> "* * * in a qualified sense the mark is property, protected and alienable, although as with other property its outline is shown only by the law of torts, of which the right is a prophetic summary."

The legislation here involved merely defines and makes civilly actionable, conduct injurious to a property right which the law of California originally created.

Moreover, a trade mark is property of a peculiar, intangible sort. Its value depends upon acceptance by a fickle consuming public, it is difficult to build up and easy to injure, as Mr. Justice Holmes said in *Bourjois* v. *Katzel,* 260 U. S. 689, 692:

> "It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care."

The protection of trade marks has always been regarded as sound public policy. Mr. Justice Clifford said in *McLean* v. *Fleming,* 96 U. S. 245, 252:

> "Everywhere courts of justice proceed upon the ground that a party has a valuable interest in the good-will of his trade, and in the labels or trade-mark which he adopts to enlarge and perpetuate it. Hence it is held that he, as proprietor, is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority."

The nature of a trade mark is such that its owner cannot keep it in possession but must constantly pass it through the hands of many dealers to millions of

consumers. But the warranty of reliability which the trade mark implies is the warranty of the trade mark owner. "It stakes the reputation of the plaintiff upon the character of the goods." (*Bourjois* v. *Katzel,* 260 U. S. 689, 692.) When the owner of the trade mark passes goods bearing it through trade channels to the public, he never loses title to the mark even though he sells the commodity to which it is applied. A buyer of goods bearing a trade mark, therefore, is not the owner of the trade mark although he may own the goods.[12] It would seem to follow that state legislation dealing with the treatment which must be given a trade mark by one who is not the owner of the trade mark, does not deprive such person of his property because he has no ownership in it.

Similar problems were involved in the legislation in most of the states forbidding or regulating the re-use of bottles or other containers bearing the trade mark of the person who originally filled the bottle.[12a]

As was recognized by Mr. Chief Justice Taft in *American Steel Foundries* v. *Robertson,* 262 U. S. 209, the rights of an owner of a Federally registered trade-mark are analogous to the rights of the owners of patents and copyrights. The distinction between the property right in a copyright and the property rights in the work or publication protected by the copyright is well recognized.

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[12] "In the very nature of the case, as it seems to me, the trademark must be something other than, and separate from, the merchandise." (*Davis* v. *Davis,* 27 Fed. 490, 492.)

[12a] For example, see *People* v. *Cannon,* 139 N. Y. 32.

People v. *Luhrs,* 195 N. Y. 377; *Hostetter* v. *Goerling,* 173 N. Y. Supp. 375, 9 T. M. R. 65.

In *Stevens* v. *Gladding,* 17 How. 447, 452 (57-58 U. S. 470, 475), this court said:

> "And upon this question of the annexation of the copyright to the plate it is to be observed, first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other. It was lawful for anyone to make, own, and sell this copper plate. The manufacture of stereotype plates is an established business, and the ownership of the plates of a book under copyright may be, and doubtless in practice is, separated from the ownership of the copyright. If an execution against a stereotype founder were levied on such plates, which he had made for an author and not delivered, the title to those plates would be passed by the execution sale, and the purchaser might sell them, but clearly he could not print and publish the book for which they were made. The right to print and publish is therefore not necessarily annexed to the plate, nor parcel of it."

To the same effect is *Stephens* v. *Cady,* 14 How. 528, 531 (55-56 U. S. 565, 568), in which the court said:

> "But the property in the copy-right is regarded as a different and distinct right, wholly detached from the manuscript, or any other physical existence, and will not pass with the manuscript unless included by express words in the transfer."

See also *Henry Bill Publishing Co.* v. *Smythe,* 27 Fed. 914, especially at 922, where the court said:

> "Certainly, congress may prohibit any owner of the paper, twine, and leather called a 'book' from selling, using, or enjoying, even by reading, if congress choose, the printed words used to express the ideas therein, until the author has received his compensation in money for his labor in producing those ideas. The only question is the extent to which congress has gone in the legislation under

> consideration. The purchaser of the paper, leather, and twine does not necessarily purchase the literary property, and he *cannot use his ownership of the one to defraud the author of his property in the other. This case illustrates the necessity for maintaining that distinction.*" (Italics ours.)

It will be observed that the purpose of the California statute under discussion here is to prevent a store keeper from intentionally using what he owns (the commodity itself) to injure a third person in his property in the trade mark which the store keeper does not own, and if the legislation be reasonable, it is not objectionable.

The price cutter uses a trade mark which he does not own as bait to catch customers to sell them other goods on which he makes a profit. A trade mark is visible reputation and the reputation the price cutter uses to get people into his store does not belong to him but belongs to the owner of the trade mark. Thus the price cutter appropriates for an ulterior purpose a reputation not his own. The situation is not different in its essentials from that in *International News Service* v. *Associated Press,* 248 U. S. 215, 240, and as mentioned by the Chief Justice in *Schechter* v. *U. S.,* 295 U. S. 495, 532, where, in speaking of unfair competition, he said "In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation * * *."

(b) **Section 1½ is valid as a specification of acts constituting unfair competition.**

In order to see Section 1½ in proper perspective in this aspect of the discussion, it is desirable briefly to trace the history of the idea of unfair competition from the first use of the phrase.

The injury resulting from the imitation of a trader's identifying mark was the sale of a competitor's goods as those of the original user and hence to interfere with his trade expectancy or "good will" by depriving him of customers by misrepresentation. The notion of property in trade marks was thus developed and for a while it served well enough but it was very soon perceived that a trader's customers might be diverted by the imitation of elements which were not trade marks and in which property rights could not be maintained, such as simulation of packages, the misuse of personal names, descriptive words and the like. The result was the same misrepresentation and the same interference with trade expectancy. At first the courts had difficulty in adjusting themselves to the situation. Law writers did not know where to classify these cases. Digest compilers put them under an added paragraph heading "Cases analogous to trade mark cases." A chapter similarly entitled was tacked on to text books. Mr. Browne in the first edition of his book on Trade Marks (Boston, Little, Brown & Co., 1873) had a chapter (XII) "Rights analogous to those of Trade Marks." The phrase unfair competition was not used. In the second edition (1885) the same chapter heading is used but the phrase "unfair competition" appears in the index and in Section 43 it is said:

> "*Unfair competition in Business.*—In examining cases classified in digests and books of reports as those of trade-marks, the reader is sometimes puzzled. In the absence of the slightest evidence that technical trade-marks have been infringed, courts of equity have granted full and complete redress for an improper use of labels, wrappers, bill-heads, signs, or other things that are essentially *publici juris.* The difficulty is, that wrong names are used. French-speaking nations have a

> standard name for this kind of wrong. The term used is *concurrence deloyale*. This term may fairly be Anglicized as a dishonest, treacherous, perfidious rivalry in trade. In the German Imperial Court of Colmar, in 1873, the court said that current jurisprudence understands by *concurrence deloyale* all manoeuvres that cause prejudice to the name of a property, to the renown of a merchandise, or in lessening the custom due to rivals in business. The euphemism employed as a head to this section will answer the present purpose."

The phrase unfair competition soon became applied exclusively to cases involving passing off and the law itself was in danger of being crystallized by the supposed limitations of the term. Happily, unfair competition soon became applied to conduct which did not involve passing off and was extended to include misappropriation as well as misrepresentation,[13] and in general to conduct which artifically and injuriously interferes with the normal course of trade (*International News Service* v. *Associated Press,* 248 U. S. 215, 240). Thus, disparagement,[14] molestation,[15] inducing breach of contract,[16] commercial bribery,[17] misleading advertising,[17] false trade descriptions,[17] misrepresentation of

[13] *International News Service* v. *Associated Press,* 248 U. S 215, 241, 242; *Schechter* v. *United States,* 295 U. S. 495, 532.

[14] Smith, Disparagement of Property, 1913, 13 Col. Law Rev. 13; Pound, Equitable Relief Against Defamation, 1916, 29 Harvard Law Review, 640, 668.

[15] *Evenson* v. *Spaulding,* 150 Fed. 517.

[16] Sayre, Inducing Breach of Contract, 1923, 36 Harvard Law Review 663; Carpenter, Interference with Contract Relations, 41 Harvard Law Review 728.

[17] *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483; *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67.

business status,[18] use of lotteries as a sales stimulant,[19] all illustrate only a few instances which show how the phrase unfair competition or unfair methods of competition has expanded from its small beginnings to its present scope.[20] Indeed the French, to whom we owe the phrase unfair competition, recognize injurious price cutting as a variety of it,[21] and this Court has spoken of "unfair methods of competition such as local price cutting."[22]

The applicability of this development to the present discussion is, we think, obvious. Section 1½ in reality has nothing to do with *price fixing*. It makes actionable, injurious *price cutting*. In this case it is the price cutting dealer who fixes the price of the trade marked goods in the market in which he operates, because with respect to indentified merchandise, the lowest price *is* the market price. Thus it is the defendant in this case who is claiming the constitutional right to fix the price at which Factor goods shall be sold in Beverly Hills.

Mr. Justice Pitney said in *International News Service* v. *Associated Press*, 248 U. S. 215, 236:

> "Obviously, the question of what is unfair competition in business must be determined with par-

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[18] *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212.

[19] *Federal Trade Commission* v. *Keppel & Bro:*, 291 U. S. 304.

[20] See article "Unfair Competition" by Milton Handler, 21 Iowa Law Review 175, January, 1936.

[21] See Pouillet, Traite des Marques de Fabrique, Par. 1221:

> "No doubt that on principle, and in the absence of an agreement to the contrary, a retailer has the right to sell at a price that suits him, even at a loss, articles which he buys for his trade. That is one of the evident consequences of the principle of freedom of trade. Nevertheless, the rule is far from being without exceptions. Sale at a cut price may take place under such conditions, with so evident an intention to depreciate the merchandise, that it becomes an act of unfair competition."

[22] *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 43.

> ticular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves."

Price cutting as a variety of unfair competition is probably actionable at common law.[23] Certainly a state can make it so by statute.

By such statutes as this, the state merely opens its courts to the injured party by giving him an opportunity to recover such damages as he can prove that he suffered from an injurious act. No penalty is provided; nothing is forbidden; a civil suit is authorized, no more.

No one is deprived of liberty or property merely because he is made liable to a civil suit. It has been held repeatedly by this court that states without depriving anyone of his constitutional rights, may create a civil liability where none existed before, take away defenses and in general may determine for themselves what shall be actionable.

In *St. Louis and S. F. Railway* v. *Mathews*, 165 U. S. 1, 27, the court said:

> "The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered."

In *Chicago and Alton Railroad Co.* v. *Tranbarger*, 238 U. S. 67, 76, which involved a Missouri statute compelling surface water outlets, Mr. Justice Pitney said:

> "The previous immunity from responsibility for such injury was nothing more than a general

[23] *Tuttle* v. *Buck*, 107 Minn. 145, 119 N. W. 946; *Boggs* v. *Duncan Shell Furniture Co.*, 163 Iowa 106, 143 N. W. 483; *Dunshee* v. *Standard Oil Co.*, 152 Iowa 618, aff'd. 165 Iowa 625, 132 N. W. 371.

rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no person has a vested right in any general rule of law or policy or legislation entitling him to insist that it shall remain unchanged for his benefit * * * so an immunity from a change of the general rules of law will not ordinarily be implied as an unexpressed term of an express contract * * *.

But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and wide-spread injury to property."

In *George* v. *Board of Revenue,* 207 Ala. 227, 92 South. 269, before the enactment of the statute in issue, the common law required that stock be "fenced out, not in." (*Clear Creek Lumber Co.* v. *Gossom,* 151 Ala. 450, 44 South. 404.) The stock law later required owners of cattle to fence them in or be liable for damages they caused. The Court in this case said;

"The decisions are to the effect that, should he exercise the right and permit his cattle to run at large, he nevertheless subjects himself to liability should they wander into a stock law district and commit depredations upon property of residents of such district."

Statutes making the seller of liquor liable civilly for all damages done by the purchaser are valid. In *Bertholf* v. *O'Reilly,* 74 N. Y. 509, 513, the Court said:

"The question we are now to determine is whether the Legislature has the power to create a cause of action for damages, in favor of a person injured in person or property by the act of an intoxicated person * * *."

This opinion contains a full and valuable discussion of police power and concludes that the legislation in question is but an extension by the legislature of the principle expressed in the maxim "*sic utere tuo*, etc." to cases to which it had not before been applied and that "the propriety of such an application is a legislative and not a judicial question." A similar case in this Court is *Eiger* v. *Garrity*, 246 U. S. 97.

A statute making one who excavates more than twelve feet, liable for damages to adjoining property, is constitutional. *Tillson* v. *Consumers' Power Co.*, 269 Mich. 53, 256 N. W. 801.

In *Kimmish* v. *Ball*, 129 U. S. 217, 222, this court said:

> "The case is, therefore, reduced to this, whether the State may not provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damages caused by the spread of the disease occasioned thereby; and upon that we do not entertain the slightest doubt."

In *M. K. T. Railroad Co.* v. *Haber*, 169 U. S. 613, 625, there was under consideration a Kansas statute giving a right of action for damages caused anyone by another's transportation of diseased animals. This court upheld the statute saying:

> "It did nothing more than declare as a rule of civil liability in Kansas, that anyone driving, shipping or transporting * * * cattle liable to impart [disease] * * * should be responsible in damages to any persons injured thereby."

There is no doubt that the legislature of a state may create causes of action and the right to recover damages for acts which theretofore were not actionable. This statement is such a truism that to cite examples of

bulk sales laws, automobile speed limits, death actions, and the like, seems facetious. Indeed, the legislature may and often does subject persons to liability without fault. A few examples are workmen's compensation laws, *New York Central Railroad* v. *White*, 243 U. S. 188; the liability of railroads for fires caused by locomotives and for injuries to passengers, *Chicago Railroad Co.* v. *Zernecke*, 183 U. S. 582; of the driver of animals for injury to the highway, *Jones* v. *Brim*, 165 U. S. 180; of damage to municipalities done by mobs, *Chicago* v. *Sturges*, 222 U. S. 313;[24] of the owner of an automobile for injury caused by the automobile when driven by a third person.

The question which this court is called upon to decide is whether, under the economic situation existing in the State of California, that State has a right with respect to transactions entirely within its borders, to define acts which are unfair in fact to be unfair competition in law and to give access to the California courts to persons who may be damaged by them.

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71, the Bingham Act of the Kentucky legislature penalized anyone who knowingly induced a member of a co-operative marketing association to violate his contracts. It was argued that this provision was unconstitutional. Mr. Justice McReynolds said (Page 91):

> "Counsel maintain that the Bingham Act takes from the Warehouse Company the right to carry

[24] See Note on mob liability statutes 13 A. L. R. 754. See also 12 C. J. 1241 *et seq.* under heading "creation and enlargement of liability". See an article by Elmer Smead in 21 Cornell Quarterly 276 on "*sic utere tuo*, etc." as a basis of state police power. Many cases of statutory liability—absolute and regardless of fault are collected in a Note 53 A. L. R. 875.

on business in the usual way by accepting and selling the tobacco of those who voluntarily seek its services and thus unduly abridges its liberty. Undoubtedly the statute does prohibit and penalize action not theretofore so restricted and to that extent interferes with freedom. But this is done to protect certain contracts which the legislature deemed of great importance to the public and peculiarly subject to invasion. We need not determine whether the liberty protected by the Constitution includes the right to induce a breach of contract between others for the aggrandizement of the intermeddler—to violate the nice sense of right which honorable traders ought to observe."

(c) Section 1½ is valid because it does no more than to make a willful act civilly actionable by a person injured thereby.

This section declares that acts wilfully and knowingly done are actionable at the suit of any person damaged thereby.

As the Supreme Court of California suggested, this section is not solely a price fixing or regulating statute (R. 38). The Court observed:

> "The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others."

Analysis of the language of Section 1½ will show the correctness of the Court's conclusion.

"Wilfully and knowingly" is a term well understood. These words have been defined by this court to mean, for a bad purpose, without justifiable excuse. (*Potter* v. *United States,* 155 U. S. 438, 446; *Spurr* v. *United States,* 174 U. S. 728, 734; *Felton* v. *United States,* 96 U. S. 699, 702).

The language "* * * at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act" may be paraphrased: "* * * at less than established prices" or "in violation of a lawful contract." Whether a person "is or is not a party to such contract" is the contested point.

A party to a contract, of course, is liable if he breaks it. No question is raised except as to the liability of one who is not a party. The invalidity is asserted to result from the two words "is not" and it is claimed that these bind a man to observe a contract he did not make and thus to deprive him of his property because it interferes with his right of free bargaining or making any contract he pleases.[25]

But the definition of a non-contracting party's liability is plain enough when the language of the act is considered in its legal meaning. He is a person who

[25] In *Chicago, Burlington and Quincy Railroad Company* v. *McGuire,* 219 U. S. 549, 564, Mr. Justice Hughes said:

"The first ground of attack is that the statute violates the Fourteenth Amendment by reason of the restraint it lays upon liberty of contract. This section of the Code of Iowa (§ 2071), as originally enacted, imposed liability upon railroad corporations for injuries to employes, although caused by the negligence or mismanagement of fellow-servants. And it was held by this court that it was clearly within the competency of the legislature to prescribe this measure of responsibility. *Minneapolis & St. Louis Railway Co.* v. *Herrick,* 127 U. S. 210, following *Missouri Railway Co.* v. *Mackey,* 127 U. S. 205."

Page 567:

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses."

See also *Frisbie* v. *United States,* 157 U. S. 160, 165, 166.

knowing of a lawful contract, purposely interferes with its operation.[26] This the act calls "unfair competition," which is an epithet to characterize the preceding language (*Hurn* v. *Oursler,* 289 U. S. 238, 246). This unfair competition is made "actionable at the suit of any person damaged thereby." "Actionable" means ground for legal proceedings. "Damage" means "The compensation which the law will award for an injury done." (*Scott* v. *Donald,* 165 U. S. 58, 86.) Hence, "person damaged" means one hurt by a legal injury.

Naturally the California Fair Trade Act applies only to the State of California since state statutes have no extra-territorial force[27] and the state, in providing for a civil suit, must be presumed to have intended to confer jurisdiction upon its own courts. Therefore, to paraphrase Section 1½ it would read:

> "To advertise, offer for sale or sell any commodity identified by a trade mark, brand or name at less than the established price therefor when done for a bad purpose and without justifiable excuse is ground for a civil suit in the courts of California by any person who can show that he has suffered legal injury therefrom."

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[26] The demurrer admits the averment of the complaint that the defendant in this case acted maliciously (R. 11) and without legal justification. His acts resulted in threats of cancellation of their contracts by plaintiffs' customers (R. 12); thus damage is also admitted. Malice in this case is not only an admitted fact but is suggested by the circumstance that defendant could have obtained Factor goods from plaintiff at less than he actually paid for them (R. 11). On the factor of motive as a condition to liability compare *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, with *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, and *State* v. *Bridgeman & Russell Co.,* 117 Minn. 186.

[27] *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357.

The question in this aspect resolves itself thus and we should suppose that no one would seriously dispute the validity of such an act. It will be observed that nothing is prohibited. There is no penalty. There is no criminal liability. The act here assailed does no more than define a civil liability and provides that suit may be brought to recover, if one can show a legal injury, for acts which many courts, on common law principles, have long regarded as wrongful. The defendant is not deprived of any defense.[28] As the Court said in the *Arizona Employers' Liability Cases,* 250 U. S. 400, 426:

> "And it amounts to a contradiction of terms to say that in submitting a controversy between litigants to the established courts, there to be tried according to long-established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of 'due process of law.' "

Moreover, it is significant that the normal, and perhaps the only practical, remedy available for the enforcement of the Fair Trade Act is injunctive relief, as is sought in the present case. This being an equitable remedy, the court, as a court of equity, is vested with the broad and discretionary powers which characterize equity jurisdiction. The court is thus always at liberty to deny relief where particular circumstances make it inequitable to grant it.[29]

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[28] *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 501. *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348.

[29] The distinction between law and equity has been abolished in California. There is but one form of civil action in which every defense, legal or equitable, is available (1 California Jurisprudence 312).

(d) The presumption of constitutionality is particularly applicable to the statute now before the court.

The attack on Section 1½ of the California Fair Trade Act is on the specific ground that it deprives defendant of his property and liberty without due process (R. 58, 59) because by making him liable to a civil suit by anyone to whom his acts cause legal damage, it interferes with his asserted right to sell plaintiffs' trade-marked goods at any price he pleases and regardless of consequences.

In every case where it is averred that the due process clause is violated, the question, it seems to us, is whether there has been a reasonable exercise of legislative power and whether the means adopted have a real and substantial relation to the end sought.

The end sought in the present act is expressed by its title, "to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name." The means adopted are to make one who knowingly sells trade-marked goods at less than the price established in lawful contracts, liable to a civil action, for unfair competition, at the suit of any person damaged.

The protection of trade-marks against injurious practices is within the province of the states since trade-marks have their origin in state laws. The end, therefore, of this legislation, *i. e.*, the protection of trade marks, is legitimate and within the power of the state. The constitutional question remaining is whether the means to attain the end are appropriate, adapted to attain it and are not prohibited.

The regulation of local business by the legislatures of the various states has been approved in countless cases. Numerous examples are in the margin.[30] These regulations have been for many different purposes, in-

[30] This court has held that a legislature may fix the charges the owners of grain warehouses and elevators may make. (*Munn* v. *Illinois* (1876), 94 U. S. 113; *Brass* v. *North Dakota* (1894), 153 U. S. 391; *Budd* v. *New York* (1892), 143 U. S. 517.)

Fix the charges insurance companies may make. (*German Alliance Ins. Co.* v. *Lewis* (1914), 233 U. S. 389.)

Limit agents' commissions on fire insurance policies. (*O'Gorman* v. *Hartford Insurance Co.* (1931), 282 U. S. 251.)

Require miners to be paid per ton of coal uncreened instead of screened. (*McLean* v. *Arkansas* (1909), 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple* (1915), 236 U. S. 338.)

Require employers who pay their men in store orders to redeem them in cash. (*Knoxville Iron Co.* v. *Harbison* (1901), 183 U. S. 13; *Dayton Coal & Iron Co.* v. *Barton* (1901), 183 U. S. 23; *Keokee Cons. Coke Co.* v. *Taylor* (1914), 234 U. S. 224.)

Fix the fees chargeable by attorneys appearing for injured employees before Workmen's Compensation Commissions. (*Yeiser* v. *Dysart* (1925), 267 U. S. 540.)

Fix the rate of pay for overtime work. (*Bunting* v. *Oregon* (1917), 243 U. S. 426.)

Regulate attorneys' fees for preparing and prosecuting pension claims. (*Frisbie* v. *U. S.* (1895), 157 U. S. 160.)

Fix the time within which the services of employees must be paid for, and provide for semi-monthly payments of wages. (*Erie R. R. Co.* v. *Williams* (1914), 233 U. S. 685.)

Establish maximum hours of labor for men. (*Holden* v. *Hardy* (1898), 169 U. S. 366.)

Establish maximum hours of labor for women. (*Muller* v. *Oregon* (1908), 208 U. S. 412; *Miller* v. *Wilson* (1915), 236 U. S. 373.)

Prohibit the payment of wages in advance. (*Patterson* v. *Bark Eudora* (1902), 190 U. S. 169; *Strathearn Steamship Co.* v. *Dillon* (1920), 252 U. S. 348.)

Require that loaves of bread of only a certain size be sold. (*Schmidinger* v. *Chicago* (1913), 226 U. S. 578.)

Prohibit the sale of berries in any container except in those of prescribed dimensions. (*Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176 (Nov. 18, 1935).)

cluding the creation of new rights and liabilities and the destruction of existing ones.[31] Some are cited by the Court below (R. 35). Mr. Justice Stone mentions many in his opinion in *Tyson* v. *Banton,* 273 U. S. 418, 453, and Mr. Justice Roberts in *Nebbia* v. *New York,* 291 U. S. 502, 526, where laws to secure fair trade practices are included among the illustrations which have been found consistent with due process. On page 530 it is said:

> "The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the

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Fix the maximum rate of interest chargeable on loans. (*Griffith* v. *Connecticut* (1910), 218 U. S. 563.)

Regulate sales of merchandise in bulk. (*Lemieux* v. *Young* (1909), 211 U. S. 489.)

Regulate the net weight of retail packages. (*Armour* v. *North Dakota* (1916), 240 U. S. 510.)

Declare void sales of commodities on margin or for future delivery. (*Booth* v. *Illinois* (1902), 184 U. S. 425; *Brodnax* v. *Missouri* (1911), 219 U. S. 285.)

Forbid unfair competition by the charging of lower prices in one locality than those exacted in another. (*Central Lumber Co.* v. *South Dakota* (1912), 226 U. S. 157.)

Forbid giving trade inducements to purchasers, by imposing a prohibitive tax on merchants giving such inducements. (*Rast* v. *Van Deman & L. Co.* (1916), 240 U. S. 342.)

Authorize a board to fix the retail price of milk. (*Nebbia* v. *New York,* 291 U. S. 502.)

Prohibit interference with cooperative marketing contracts. (*Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Marketing Association,* 276 U. S. 71.)

Authorize the Secretary of Agriculture to fix charges made by marketing agencies in stockyards. (*Tagg Bros.* v. *U. S.* (1930), 280 U. S. 420.)

[31] Right of employee to recover for injury caused by a fellow servant, *Missouri Ry.* v. *Mackey,* 127 U. S. 205 (1888).

Absolute liability for fire caused by sparks from locomotives, *St. L. & S. F. Ry. Co.* v. *Mathews,* 165 U. S. 1 (1897).

cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter."

Liability for fire caused by sparks from locomotives, plus liability for attorneys' fees, *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96 (1899).

Right to recover gambling losses from owner of premises used for gambling purposes, *Marvin* v. *Trout*, 199 U. S. 212 (1905).

Limitation of carrier's liability for injury to one not a passenger or employee, *Martin* v. *Pittsburgh & Lake Erie R. R.*, 203 U. S. 284 (1906).

Liability of mine owner for the wilful negligence of his managers and mine examiners, *Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60 (1907).

Liability for non-delivery of messages regardless of contracts limiting such liability, *Western Union Tel. Co.* v. *Commercial Milling Co.*, 218 U. S. 406 (1910).

Right of employee to recover for the negligence of fellow servants regardless of contracts limiting his employer from such liability. *C. B. & Q. Ry.* v. *McGuire*, 219 U. S. 549 (1911).

Absolute liability of city for injury to property caused by mob violence, *City of Chicago* v. *Sturges*, 222 U. S. 313 (1911).

Liability to provide a drain for surface water, *Chicago & Alton* v. *Tranbarger*, 238 U. S. 67 (1915).

Right to recover compensation for injury regardless of fault or contributory negligence, *New York Central R. Co.* v. *White*, 243 U. S. 188 (1917); same, *Mountain Timber Co.* v. *Washington*, 243 U. S. 219 (1917); same, Arizona Employers' Liability Cases, 250 U. S. 400 (1919).

Right to recover punitive damages for negligent homicide, *Pizitz Dry Goods Co.* v. *Yeldell*, 274 U. S. 112 (1927).

Limitation of automobile owners' liability for injury to guest except when occasioned by willful and wanton negligence, *Silver* v. *Silver*, 280 U. S. 117 (1929).

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"The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago."

(e) The statute here in question is reasonable and desirable in its practical effect.

We think that, especially since the statute in this case relates to local business practices, great weight is to be given to the legislative determination of the need of legislation and that the discussion should start with the presumption that the legislature of California had reasonable grounds for its action.[32]

Statutes frequently wrestle with an economic problem, the solution of which is a matter of controversy. The wisdom of the statute is not the test of its constitutionality, nor is it within the cognizance of the court that passes upon its constitutionality.[33] All doubts

[32] 36 Columbia Law Review 283, "The Presumption of Constitutionality Reconsidered."

49 Harvard Law Review 631, "The Presentation of Facts Underlying the Constitutionality of Statutes."

38 Harvard Law Review 6, Biklé, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action."

[33] Courts of last resort in California, Illinois, New York and New Jersey have passed upon the precise question now before this court. The Supreme Courts of California and Illinois (*Max Factor & Co.* v. *Kunsman*, R. 24, 5 Cal. (2) 446, 55 Pac. (2) 177; *Joseph Triner Corporation* v. *McNeil*, 363 Ill. 559, 2 N. E. (2) 929; *Seagram* v. *Old Dearborn*, 363 Ill. 610, 2 N. E. (2) 940, holding the statute constitutional, refused to follow the New York Court of Appeals decision that the statute was unconstitutional (*Doubleday*,

must be resolved in favor of the legislation. These principles are fundamental and have never been questioned.

> "But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail — principle or condition — cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that *each act of legislation has the support of the presumption that it is an exercise in the interest of the public.* The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. *The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance.*" (Italics added.) (*Erie Railroad Co.* v. *Williams,* 233 U. S. 685, at p. 699.)

> "Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." (*Nebbia* v. *New York,* 291 U. S. 502, 537.)

Constitutional law is not a static body of unchanging dogma; it is a moving, growing, dynamic force, using as its tools time-honored principles, but applying them with an understanding that is alive to new conditions

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Doran & Co., Inc. v. *R. H. Macy & Co., Inc.,* 269 N. Y. 272, 199 N. E. 409.) The Vice Chancellor in New Jersey came to the same conclusion as the New York Court of Appeals, *Johnson & Johnson* v. *Weisbard,* 120 N. J. Eq. 314, 184 Atl. 783.

and needs. That which a legislature may not prescribe at one time it may very properly prescribe at another time under changed circumstances. It has been discovered that there is a far greater inter-relationship between the conduct of private business, in its vast ramifications under modern conditions, and the general public welfare, than was previously supposed. It has likewise been perceived that unchecked competition is not necessarily consistent with public welfare. The scope of the interest of the state has necessarily grown, and the state may, by legislation, seek to protect that interest.

(f) Common law analogies.

(1) Section 1½ is an application of principles similar to those which underlie the doctrine of equitable servitudes.

Independently of any statute, the imposing of restrictions upon property by contract between buyer and seller, binding upon subsequent, noncontracting purchasers, is not a concept new to the law. For many years, courts of equity have been enforcing, against noncontracting parties, covenants made with respect to real property. (*Tulk* v. *Moxhay,* 2 Ph. 774 [1848].)

Other early English decisions suggest that the courts were conscious of the possibility of extending the doctrine to chattels. Thus, in *De Mattos* v. *Gibson,* 2 Ph. 774 (1848), holding that the charterer of a ship might specifically enforce his rights against a mortgagee who had notice of the charter, Lord Justice Knight Bruce observed:

> "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer

shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. This rule, applicable alike in general as I conceive to movable and immovable property, and recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no room for any exception in the instance before us."[34]

The situation in this case is very close to the one which came before the court in *Bourjois* v. *Katzel*, 260 U. S. 689. There plaintiff was the assignee for the United States of the good will and trade marks of a French manufacturer of face powder and with slight modifications was using the marks and labels thus acquired in the United States, applying them to goods made in France and packed there. The defendant purchased goods of the original French manufacturer under the original trade mark, which it was conceded, the original manufacturer had retained for France. Defendant sold the original in this country in competition with the plaintiff. Plaintiff sought an injunction. Defendant argued that the goods she was selling

[34] In *Werderman* v. *Societe Generale d'Electricite*, 19 Ch. D. 246, 252 (1881), holding that the grantor of a patent was entitled to an accounting against the grantees' assignee, where the latter knew the terms of the grant, Sir George Jessel remarked:

"The parties intended certain liabilities to attach to the patent itself • • • It is quite plain that nobody could take the patent with notice of that arrangement, and say we will keep all the profits and will not be liable to account • • • It is a part of the bargain that the patent shall be worked in a particular way and the profits disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability."

were the genuine goods, lawfully acquired and that there was nothing unlawful in what she was doing.

Mr. Justice Holmes said (p. 691):

> "If for the purpose of evading the effect of the transfer, it [the French manufacturer] had arranged with the defendant that she should sell with the old label, we suppose that no one would doubt that the contrivance must fail. There is no such conspiracy here, but, apart from the opening of a door to one, the vendors could not convey their goods free from the restriction to which the vendors were subject. Ownership of the goods does not carry the right to sell them with a specific mark. It does not necessarily carry the right to sell them at all in a given place."

This approach to the question finds additional support in *Bitterman* v. *Louisville and Nashville Railroad Company,* 207 U. S. 205, which held that the non-transferability and forfeiture clauses in a railroad ticket are binding not only upon the original purchaser but also upon any person who may acquire the ticket. Mr. Justice White said (pp. 221, 222):

> "That the complainant had the lawful right to sell non-transferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of non-transferability and forfeiture embodied in such tickets was not only binding upon the original purchaser but upon anyone who acquired such a ticket and attempted to use the same in violation of its terms is also settled. *Mosher* v. *Railroad Co.,* 127 U. S. 390. See, also, *Boylan* v. *Hot Springs Co.,* 132 U. S. 146.
>
> * * * * * *
>
> "Any third person acquiring a non-transferable reduced rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all

> such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such ticket acquired anything more than a limited and qualified ownership thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture, retain a subordinate interest in the ticket amounting to a right of property therein, which a court of equity would protect. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, and authorities there cited. See also, *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 128 Fed. Rep. 800."

The power of courts of equity to impose equitable servitudes on chattels is examined at some length in an able article by Professor Zechariah Chafee, Jr., published in Volume XLI, Harvard Law Review, page 945 (June, 1928) entitled "Equitable Servitudes on Chattels". Professor Chafee points out that restraints on the alienation of land, binding upon sub-purchasers, are common, and that similar restraints as to chattels are not entirely without precedent but, on the contrary, are quite within the powers of courts of equity, should practical considerations require their assertion. He concludes:

> "On general principles equitable servitudes on chattels seem a reasonable and flexible device, which the courts might use when desirable." (page 1007.)

It is significant that Professor Chafee is discussing equitable servitudes on chattels as creatures of courts of equity, unassisted by statutes. He considers the problem from the historical standpoint, and believes that courts of equity have the necessary power if they choose to use it. *A fortiori,* statutes may prescribe its use.

Courts of equity may have hesitated to enforce similar restrictions upon the alienation of personal property. But a legislature is not precluded from determining that, as to a certain class of personal property, conditions create an economic reason for permitting such restrictions. Where a legislature does so, it would seem the contention that such statute is unconstitutional ignores completely the historical antecedents and common law analogies for such a remedy.

Defendant looks upon the idea of compelling respect for the terms of a contract made by other parties as something wholly unprecedented. Yet that is exactly what is done every time a court of equity enforces an equitable servitude against a sub-vendee of property.

Many decisions of this court, cited elsewhere in this brief, uphold statutes which restrict the right to contract and the right of free alienation, even though such statutes were not in line with the historic antecedents and common law analogies pointed out by Professor Chafee. The statutes in such cases for that reason went far beyond the California Fair Trade Act, for they introduced entirely new social experiments and were often diametrically opposed to the prior common law. That this court upheld them indicates the breadth of the state's so-called "police power" and furnishes ample authority for the constitutionality of the statute now before the court.

(2) The doctrine of tortious interference with contract relations provides a further common law analogy.

The common law has dealt with various phases of the problem of protecting contractual relationships against breaches and interference caused by the otherwise legal acts of third persons. *Lumley* v. *Gye,* 2

El. & Bl. 216 (1853), led the way for the establishment, in nearly all common law jurisdictions, of the principle that the law will not permit a person wilfully to induce another to breach a contract. The leading cases on the subject are collected in: Carpenter, Interference with Contract Relations, 41 Harvard Law Review 728 (1928), and Sayre, Inducing Breach of Contract, 36 Harvard Law Review 663 (1923). In *Angle* v. *Chicago, St. Paul, Minneapolis and Omaha Railway Company,* 151 U. S. 1, this court applied and approved the common law doctrine.

The California Supreme Court recognized, in passing upon Section 1½, this common law analogy, saying (R. 38):

> "The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. * * * The statute here involved, in a large measure, merely extends that common law doctrine to the transactions enumerated in the statute."

This, of course, follows from the fact that the "willful and knowing" acts specified in Section 1½ inevitably induce breaches of the contracts authorized by the act and the common law of California.

IV.

Comments on Appellant's Brief.

Attempts are made to question the validity of Section 1½ by conjuring up extreme and improbable situations of fact under which its enforcement might be inequitable or difficult. There is hardly a law on

the statute books which could not be similarly attacked. Indeed, it is doubtful that any law exists which applies, ideally, to all imaginable situations.

Ample and controlling authority indicates that conceivable difficulties do not invalidate a statutory enactment and that the court in determining constitutionality should base its decision primarily upon the facts with respect to the parties before it. This court has said:

> "A statute may be invalid as applied to one state of facts and yet valid as applied to another." (*Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 289.)

> "Whether the provision of the ordinance, fixing the line with relation to the location of 60 per cent of the existing houses, in its general, or in some other specific, application is so vague as to amount to a denial of due process, is a question which does not concern petitioner, since, as applied to the facts in the present case, it is definite enough, and since, in any event, he has been excepted from the operation of the provision; and it does not appear that the alleged unconstitutional feature of which he complains has injured him or operated to deprive him of any right under the federal Constitution." (*Gorieb* v. *Fox,* 274 U. S. 603, 606.)

> "It does not appear that appellant is presently in any such danger of an unconstitutional application of these provisions of the statute as to entitle it to invoke a decision here upon the question, and the rule is well settled that 'a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage'." (*Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186.)

A litigant may question a statute's validity only when

and so far as it is being, or about to be, applied to his disadvantage.[35]

We have in this case a definite and concrete fact situation set out in the complaint and admitted by the demurrer. The facts show clearly that appellant is not beset with any of the fantastic complications or hypothetical difficulties which he imagines. In this case there are not several contracts establishing different prices or a single contract used as the basis of a general price structure or an inequitable suit against one retailer when violations are tolerated by others. These are matters which, if they should appear, might well go to the equity of any particular suit and the trial court can deal with them as, if and when they arise. There is no need, it seems to us, to argue now any other case but this one.

The general attack on the Fair Trade Act as a whole would naturally suggest that appellant is arguing that the contracts which, in this case, he admits interfering with, are invalid since he is contending that the statute which authorizes them is invalid. But these contracts were good under California law before there was a Fair Trade Act. Nowhere does appellant assert that the contracts which this suit was brought to protect are not entirely valid. Appellant's argument must be considered in the light of the admission that the contracts are valid, that appellant knew of their existence and so conducted himself as to deprive the parties to the contracts of the benefits which would result from carrying them out. In addition, appellant's interference was willful. The section of the Act which deals with this situation is 1½. This is the only part of the

[35] *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. *Yazoo & M. Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217. *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571.

Act assailed as unconstitutional by the assignments of error. This section merely says that a person who, wilfully and knowingly, *i. e.,* with a bad purpose and without justifiable excuse, commits the acts which appellant admittedly has committed, may be sued civilly by anyone who suffers legal injury therefrom. Appellant's purpose and lack of justification are admitted, as well as the injury to appellees resulting from appellant's acts. This is the fact situation in this case.

It is then asserted that the Fair Trade Act is void as a delegation of authority. It cannot be a delegation of authority for the legislature of California to declare that contracts establishing resale prices on trade marked goods may be made, because in California the right to make such contracts already existed. It cannot be a delegation of authority to provide that suit may be brought for breach of the contracts, for this right existed also. Therefore, the asserted invalidity must reside in the right given to sue a person who is not a party, if he intentionally does an act which deprives those who are parties, of the benefits resulting from having their lawful contracts carried out. This the Supreme Court of California said was a proper application of the doctrine long ago announced in *Lumley* v. *Gye,* 2 El. and Bl. 216, and now almost universally recognized—that third party interference with contracts is actionable. Moreover, to invest regularly constituted courts with jurisdiction over a civil cause of action is not the delegation of legislative power, it is the exact opposite, it is the submission of a case to the judicial power to be decided in an orderly way.[36]

Appellant in making the argument that Section 1½ deprives him of liberty and property without due proc-

[36] For a discussion see "Constitutionality of the New York Fair Trade Act", Virginia Law Rev. March 1936.

ess because he cannot sell Factor trade marked goods at any price he likes, ignores paragraph 2 of Section 1 which provides:

> "Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:
>
> (1) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity."

If appellant had a stock of Factor goods on hand and wanted to discontinue dealing in them he could close them out. Appellant, however, does not claim to sell Factor goods at less than their established prices under authority of this provision. He asserts the constitutional right to continue to procure and to sell Factor goods with knowledge of contracts establishing reasonable prices on them and thus to destroy the trade of others.

Moreover, as we read the assignments of error, no part of the Fair Trade Act except Section 1½ is in question, so appellee's criticisms that the statute is indefinite in some of its other provisions and therefore void need not be answered. However, there are two points where appellant seems clearly wrong. Appellant says (Brief, p. 21):

> "Appellant contends that the expressions 'fair and open competition' and 'general class' have no established meaning at common law. * * * The term 'general class' is, of course, utterly devoid of definite meaning."

The contrary is true. Both of these expressions have a definite meaning. "General class" is a familiar term in trade mark law and means a collection capable of general definition, a kind, goods that commercially are

commonly grouped together.[37] In this case the general class is "cosmetics".

The phrase "fair and open competition" or variants of it, is often used.[38]

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[37] U. S. C. A. Title 15 Paragraph 81—"Class of Merchandise"; Paragraph 85 "Classes of Articles"; Paragraph 131 "Classes of Merchandise". Pan-American Convention, signed at Washington, February 20, 1929, Chapter II, Article 3, Sec. 6, "merchandise of the same class"; Article 17, "merchandise of the same class"; Article 18, "merchandise of the same class" and "articles of the same class". British Merchandise Marks Acts of August 23, 1887, Sec. 16, par. (5), "different classes of such goods"; Section 18, "goods of a particular class". The words "goods of the same general class" frequently occur in the cases: *Pro-phy-lac-tic Brush Co.* v. *Abraham & Straus*, 11 F. Supp. 660, "the same general class of merchandise"; *Standard Oil Co.* v. *California Peach & Fig Growers*, 28 F. (2d) 283, "but goods are of the same general class when either their general and essential characteristics are the same"; *Ashland Refining Company* v. *United Collieries, Incorporated*, 20 U. S. Pat. Q. 171 "do the goods fall within the same general class"; *The B. F. Goodrich Co.* v. *Clive E. Hockmeyer, et al.*, 17 C. C. P. A. 1068, 1074, "goods of the same general class", "same class"; *Cheek-Neal Coffee Co.* v. *Hal Dick Mfg. Co.*, 17 C. C. P. A. 1103.

[38] Sec. 10 of the Clayton Act (15 U. S. C. A. 20); "free and fair competition". *American Column & Lumber Co.* v. *U. S.*, 257 U. S. 377, 400: "to maintain free competition"; *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 428: "to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade"; *Federal Trade Commission* v. *Algoma*, 291 U. S. 67, 78; "Fair competition is not attained • • •"; *Federal Trade Commission* v. *Raymond Bros. Clark Co.*, 263 U. S. 565, 572: "in the exercise of free competition". *Maple Flooring Mfgrs. Assn.* v. *U. S.*, 268 U. S. 563, 583: "Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities." *Trade Associations — The Legal Aspects*, by Benjamin S. Kirsh (Central Book Co. 1928) p. 15: "the legal conception of a fair and free competition • • •"

No more than passing reference need be made to the argument scattered through appellant's brief: (1) That this Act will be abused. The short answer to this is that appellant has not been subjected to any abuse. (2) That it may be invoked capriciously or maliciously. The answer to this is that in this case it has not been. (3) That persons may avail themselves of it whose trade marks may not be well known. Every sale of every commodity under every trade mark must have a beginning and the right attaches from the initial user. This has always been the law.[39]

Finally, as we see this case, the question whether goods bearing trade marks are affected with a public interest need not be decided since the Fair Trade Act does not purport to fix prices on them or on anything. Section 1½ is aimed at price cutting, not price cutting in general but the special kind of price cutting long recognized as injurious, that is, intentional price cutting on identified consumer goods, and here only to the extent of conferring upon the regularly constituted courts of California jurisdiction to entertain a civil suit by anyone suffering legal damage from it.

The Federal Trade Commission—by Gerald C. Henderson (Yale Univ. Press, 1924) p. 91: "* * * to protect the public interest in free and fair competition". At page 166: "restrictive of fair competition".

[39] *Kathreiner's* v. *Kneipp* (C. C. A. 7), 82 Fed. 321, 326:

> "* * * it is still not necessary, in our judgment, that a trade-mark in an article should be fully established, in the sense that the article be widely known, before the proprietor of its trade-mark or trade-name may be entitled to the protection of equity for the preservation of his rights. Otherwise it might be impossible with respect to a valuable and desirable article or product of manufacture, designated by a particular brand or in a particular manner, ever to establish a trade. * * * A proprietor is entitled to protection from the time of commencing the user of the trade-mark."

V.

Conclusion.

It is specious to contend that this statute is unconstitutional simply because its operation, in an absolute sense, has the effect of restraining individual conduct. That a statute deprives a person of a right which he formerly possessed, whether it be a right to go where he pleases, conduct himself as he pleases, buy or sell what he pleases, or use his property as he pleases, does not *per se,* brand it as unconstitutional. The whole process of civilization has consisted largely of the gradual surrender of the individual's right or liberty to make himself harmful or obnoxious to his fellow men. The necessity and rapidity of this surrender becomes accelerated as the population of the community increases and society becomes more and more highly organized. The founders of our Republic certainly had no intention of either prohibiting or retarding this *sine qua non* of civilized society; nor have our courts ever lost sight of it. The liberty secured by the Constitution of the United States is a liberty tempered by restraint.

This Court, in *Jacobson* v. *Massachusetts,* 197 U. S. 11, 26, expressed this fundamental principle in the following language:

> "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with

> safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

In accordance with these principles, it is well established that there is no absolute right of free bargaining. In his business as well as in his personal relationships, every individual is subject to restraints imposed by law for the purpose of promoting the general welfare, health, comfort, morals or prosperity of the community.

The price for property or services is only one of the terms in a bargain. The effect on the parties is similar whether the restriction on the power to contract affects the price, or the goods or services sold.

The test applied by this Court in a long line of cases, and, in fact, in all cases involving the liberty of contract, is well expressed in the language of Mr. Justice Hughes in *Miller* v. *Wilson,* 236 U. S. 373, 380:

> "As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint —not immunity from reasonable regulation to safeguard the public interest — *the question is whether the restrictions of the statute have reasonable relation* to a proper purpose." (italics added).

What are the proper legislative purposes?

In *Chicago B. & Q. Railway Company* v. *Illinois,* 200 U. S. 561, this Court said (592):

> "We hold that the police power of a State embraces regulations designed to promote *the public convenience or the general prosperity,* as well as

> regulations designed to promote the public health, the public morals or the public safety." (Italics added.)

The police power also embraces the protection of substantial classes of citizens from abuses affecting them. The cases we have cited concerning hours of labor, time and mode of payment of wages, fees chargeable by attorneys appearing for injured employees, unfair competition by price discriminations and trade inducements, interest chargeable on loans and many others are all examples of the valid exercise of the police power for this purpose. Certainly the state may protect the trade marks which its laws create by giving redress by civil action to anyone suffering damage resulting from their use in a manner which the legislature may consider unfair. In sustaining the validity of the act here in question we think the Supreme Court of California was right and ask that its decree be affirmed.

Respectfully submitted,

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APPENDIX.

Resale Price Maintenance, Policy and Methods.

The aim of the existing fair trade acts is to protect a producer or vendor against price-cutting by enabling him to stipulate with his vendee what the resale price of the goods shall be. The acts apply to identified merchandise sold under competitive conditions. The limitation to goods identified by a trade mark, label, brand, or producer's name is important, because unless the merchandise is so identified that the ultimate consumer may compare retail prices on identical goods, the evils of price-cutting do not arise.

The problem is to determine at what point, as a matter of public policy, the line should be drawn between price maintenance to be permitted as a legitimate and proper protection of the producer and the whole public, and price-fixing to be condemned as restraint of trade and interference with normal and fair competition.

The Historical Background.

Almost since the beginning of commerce in its simplest form, the sale of goods from the producer directly to the user, there have been discussions of restraint of trade. At first each community was an isolated section, necessarily dependent on its own resources. Hence, for apparent economic reasons, the lawmakers and courts disapproved any act or contract which interfered with a producer's means of livelihood on the one hand, or on the other hand unduly deprived the

public in any manner of the products or skill which should have been available to it.[40]

With better roads and communication systems, commerce between the hitherto isolated communities began to develop and it was no longer necessary to guard the public so zealously against monopolies or excessive prices of their local producers. People and goods began to be available from other communities and the local producers were kept in check by the new competition. It began to be recognized that even a contract with a clause which laid some restraint upon trade might still be valid and acceptable "in cases where the special matter appears so as to make it a reasonable and useful contract." It was said that—

"In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, * * * and if upon them it appears to be a just and honest contract, it ought to be maintained." [41]

As time went by commerce and industry developed with more and more interchange between communities and geographical sections; but the English courts continued to consider the propriety of each contract brought before them on the basis of the special circumstances surrounding it. As late as 1894 a broader standard was adopted for the determination upon the facts of the reasonableness of a specific contract.[42]

It is notable that the leading cases in the United

[40] Oliphant, in Cases on Trade Regulation, discusses the early English statutes and cases.

[41] *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 197 (1711) cited by Mr. Justice Hughes in *Miles* v. *Park*, 220 U. S. 373.

[42] *Nordenfelt* v. *Maxim-Nordenfelt Guns & Ammunition Co.*, App. Cas. 535 (1894).

States on the question of restraint of trade, through price maintenance and otherwise, have generally been decided upon legal technicalities without the court even having before it any real factual information from which the true effect on trade and the economic welfare of the public could be determined. Yet the public today has as much interest as the public of any earlier period in employment problems, the ability to buy quality merchandise, and the prevention of monopolistic control. It is possible that if our courts could have had before them the detailed information equivalent to that before the English courts as a matter of general knowledge in the earlier days, the restrictive decisions on price-maintenance cases would not have been rendered.

The Early Price Maintenance Cases.

The earliest American cases which allowed resale price maintenance were patent cases. The theory behind them was that it was a part of the patentee's lawful monopoly to control (by proper procedure) the conditions of resale of his patented article by the distributor to the ultimate user.[43] Even after there had been decisions forbidding resale price maintenance contracts on other goods, the new rulings were still thought to have no bearing upon the monopoly of a patentee and his consequent right to prescribe resale conditions.[44] This theory of the patentee's rights was

[43] *Heaton-Penninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288 (1896); *Henry* v. *A. B. Dick Co.*, 224 U. S. 1; *Bement* v. *National Harrow Co.*, 186 U. S. 70.

[44] *Edison* v. *Smith Mercantile Co.*, 188 Fed. 925; *Automatic Pencil Sharpener Co.* v. *Goldsmith*, 190 Fed. 205.

upheld until 1917.[45] And even in 1918 Mr. Justice Brandeis urged, in a concurring opinion, that the right of a producer to fix resale prices was an economic question depending upon the relevant facts rather than any established legal principle.[46]

This right of a patentee to fix resale prices was extended and repeatedly recognized and protected by the Federal courts upon the ground of direct analogy between the rights and monopolies of patent and trade secret articles.[47] But the rule as to trade secret articles was overthrown by a decision of Judge Lurton:[48]

> "The mere fact that one article or class of articles is made under an unknown and private formula and another class is not is an undeniable fact which may serve for some purposes to differentiate them. But that single fact does not afford an economic reason, and still less a legal reason, for saying that it operates to exempt such articles from rules against unlawful restraint of trade."

This decision was followed shortly by, and was accepted by this Court in the first leading case on the subject of price maintenance—*Dr. Miles* v. *Park* (220 U. S. 373).

The Miles *v.* Park Case.

Prior to this decision, producers had looked upon the use of resale price maintenance as their right. The

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[45] *Motion Picture Patents* v. *Universal Film Co.*, 243 U. S. 502, which expressly overruled *Henry* v. *A. B. Dick*, 224 U. S. 1.

[46] *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8.

[47] *Dr. Miles Medical Co.* v. *Goldthwaite*, 133 Fed. 794; *Same* v. *Jaynes*, 149 Fed. 838; *Same* v. *Platt*, 142 Fed. 606; *Wells & Richardson* v. *Abraham*, 146 Fed. 190; *Jayne* v. *Loder*, 149 Fed. 21; *In re Park*, 138 Fed. 421; *Hartman* v. *Platt*, 142 Fed. 606.

[48] *Miles* v. *Park* (C. C. A. 6), 164 Fed. 803, 806.

most common device for effectuating it was by written contract with the distributor whereby he agreed not to resell the article below a stipulated price. The Miles Co. required every wholesaler and retailer selling its products to sign agreements to sell the goods at prices specified by the company. The defendant in this suit was a wholesaler who induced other wholesalers to sell to it at prices violating the agreement, and who in turn sold the goods to retailers at cut prices. The Court held that the contracts were void as a restraint on the alienation of title to property owned by the dealers, and as a restraint on competition, and for both reasons against the public interest. Mr. Justice Hughes held (p. 409):

> "The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

It is important to observe, however, that this case was decided without proof or consideration of the economic factors which might have supported the plan. While the decision purported to rest upon protection of the public interest, no facts had been produced to show what was the actual effect of such a plan upon the public welfare.

Yet the Miles decision did not go so far as to condemn all contracts which act in restraint of trade. Indeed, it was expressly pointed out (406):

> "To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void against public policy."[49]

[49] Citing and quoting *Gibbs* v. *Baltimore Gas Co.* (130 U. S. 409), and *Nordenfelt* v. *Maxim-Nordenfelt* (1904 A. C. 565).

Neither in this nor in succeeding cases has resale price maintenance been held illegal per se. So, for instance, in *Federal Trade Commission* v. *Beech-Nut Packing Co.* (257 U. S. 441), though the Court enjoined certain specified practices of the Beech-Nut Co., it at the same time declared that the order of the Commission forbidding any form of price maintenance was too broad. In *Cream of Wheat Co.* v. *Federal Trade Commission* (14 Fed. (2d) 40, 48 (C. C. A. 8)), the court directed a proviso to the Commission's order to specify what the company might lawfully do to correct its resale price policy.

Wherever injunctions against resale price policies have been granted, they have been aimed at the methods that have been used to achieve the desired result, and the Court has not hesitated to approve resale price policies where the methods used were acceptable to it.

Methods Adopted Since the Miles Case.

The result of the Miles decision was that producers began to cast about for new and legal methods of maintaining retail prices at the desired level. The first of these new methods which went before and was approved by the Court was that set forth in *U. S.* v. *Colgate & Co.*, 250 U. S. 300. The manufacturer gave notice to the retailer that the goods were not to be sold below a "suggested" retail price, and supplemented this notice by a policy of refusing to sell to retailers who did not adhere to the suggested price. The Court held that no contract for price maintenance had been made; that a trader or manufacturer had a right to exercise his discretion as to the parties with whom he would deal; and that he might announce in

advance the circumstances under which he would refuse to sell.

This ruling has been followed in subsequent cases, such as *Harriet Hubbard Ayer* v. *Federal Trade Commission* (15 Fed. (2d) 274) and *Shakespeare* v. *Federal Trade Commission* (50 Fed. (2d) 758).

Another method which has been pronounced legal by this Court is that adopted by the General Electric Co., very fully set out and discussed in *United States* v. *General Electric Co.* (272 U. S. 476). This company appointed over 21,000 dealer "agents" throughout the country, to whom the goods were shipped on consignment, title to remain in the manufacturer until sale at a specified price. The Court held (488):

> "The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer."

Thus there are two ways by which, with the full approval of the law and the courts, a producer may control the price at which his merchandise is sold to the public. Yet many manufacturers who would like to achieve that result are either unwilling or financially unable to adopt either of these methods. The refusal-to-sell policy is a precarious one, because if it is carried out to the extent of affording real protection against price-cutters, the manufacturer may find that through the very willingness of his distributors to cooperate with him a combination has developed which is an illegal restraint of trade.[50] It may often be an ineffective policy because, despite the refusal of a pro-

[50] As in *Toledo Pipe-Threading Co.* v. *Federal Trade Commission* (11 Fed. (2d) 337).

ducer or his regular distributors to sell the price cutter, the latter invariably, often deviously, manages to get the goods.

If the manufacturer wishes to turn to the agency plan to control retail prices, he is faced with another, and in many instances an almost insuperable, difficulty. He must deal directly with retailers under contracts which are necessarily involved if they are complete.[51] He must set up and carry the financial burden of a whole private system of distribution. He cannot avail himself of the existing established channels. The average manufacturer cannot afford to set up a nation-wide system of his own or to carry it on with the requisite investment of capital, the additional burden of records and checking up, and the continuous close contact with his dealers which must follow the adoption of such a system.

Because of these difficulties and because in spite of them it has still been felt essential to devise some means of controlling resale prices, both manufacturers and distributors have turned to the idea and the hope embodied in the State fair-trade acts.

The Necessity for Resale Price Maintenance.

As competing channels of distribution developed with the increase of merchandising, competition between them became very keen. Price-cutting became the chief competitive weapon, and products under trade-marks or brands well-known to the consumer were obviously best adapted to the price-cutter's purpose. The greater "saving" he could offer the public

[51] Consider the many ramifications of the contract in *General Electric case*, 272 U. S. 476.

on goods the standard value of which the public knew, the more likely was the price-cutter to get customers out of his competitors' stores and into his own. More often than not, his competitors retaliated and a price war was on.

(A) To the Manufacturer.

The first economic effects of this system were felt by the manufacturers. The consumer market is the actual market of the producer, even though he may have parted with title to the physical goods before they reach the consumer. To retain his market and preserve his business and goodwill the producer must successfully solve several problems:

(1) He must have wide and well-established distribution, so that the consumer may be able to procure the goods when he wants them. But price-cut goods carry little or no profit for the retailer and hence little or no inducement to handle them.

(2) He must be assured of a reasonably even flow of distribution, so that he may be able to establish a normal course of business, may always have goods available to fill orders, yet not be left with too large a stock on his hands. But either price wars or steady price cutting disrupts the flow, because they tend to saturate the market and discourage retailers from handling the goods.

(3) He must be able to distribute his goods on such terms that the retailer can make a legitimate profit and not be tempted to substitute another brand of goods on which a greater profit can be realized.

(4) He must preserve his reputation as a manufacturer. When a cut price on goods prevails over a

long period of time, the public does not stop to analyze the dealer's reason for it. It assumes that the dealer must still be making a profit, even at the low price. The manufacturer's reputation for fairness is damaged because it is thought he has fixed an excessive price at the outset, or has subsequently used inferior and cheaper materials.

(5) Above all, he must preserve the good reputation of his goods. A quality product, consistently sold at or below the price level of a cheap product, becomes in the minds of consumers a cheap product too, because they associate it with other products in the same price group. Thus they come to believe that the normal standard price for the product is excessive and more than the article is worth.

It is apparent that either a cut-rate war or a long period of cut prices may be disastrous to a manufacturer. Either may disrupt the normal flow of his business, perhaps permanently cut off some of his avenues of distribution. His reputation and the reputation of his goods may be seriously damaged. His advertising is wasted because it becomes ineffective through lack of distribution or lack of public confidence. And he faces all this for no reason except that at the outset his reputation is good, his products are in demand, are of recognized value, and are known to be worth the normal price.

(B) To the Wholesaler.

In the earliest days of commerce it was generally possible for a retailer and often a consumer to deal directly with a manufacturer. Then a wholesaler was viewed with disfavor by the public as a "middleman" whose participation in commerce increased the cost of

the goods to the consumer without serving any useful purpose. But as intersectional commerce spread it became increasingly difficult for even the retailer to deal directly with the manufacturer. Now the wholesaler fills an important and valuable place in the modern scheme of distribution. He often takes the responsibility of introducing a new product into a territory which the manufacturer might be unable, through lack of capital, to reach. Even on well-known merchandise the wholesaler is of immense service to the producer and to the retailer on matters of credit and facility of distribution; and this service benefits the consumer too by making available the goods he desires to buy.

The wholesaler has became such an important link in the chain between the producer and the user of manufactured goods that his elimination would cause a serious disruption in distribution. He is most needed in interstate commerce, where the goods may have to be sent across the continent to reach their ultimate user. Yet this is the very place where the present state of the Federal law is forcing his elimination.

(C) To the Retailer.

Some of the present problems of the retailer are akin to those of the manufacturer. To preserve his trade he must carry in stock the well-known products that customers are likely to call for. He must be able to estimate what his normal sale of those items will be, so that he will not have to turn away customers unsatisfied and still need not keep his capital tied up in an unnecessarily large stock of goods. He must preserve the goodwill of his business by a justifiable reputation of selling quality goods at a fair price.

The small retailer—as, for instance, the neighborhood druggist—is often the one who is most useful to consumers, through convenient availability of goods and through actual services rendered in connection with them. He must, of course, have a fair margin of profit on his sales to carry his overhead and cover the services he renders. And he is the retailer who suffers most immediately and perhaps most disastrously from price cutting.

The small retailer has to face price-cutting competition from two classes of stores. The more legitimate is the group of chain stores or large department stores, which may, by quantity buying, be able to get the same goods on better terms and to pass part of the saving on to their customers. It is common practice, however, for such stores to choose well-known items—and the better known the merchandise, the more desirable for their purpose—to use as "loss leaders" or "bait." The drastic cut below the standard price may be either temporary or permanent. It does not much matter because they hope to and do recoup the sacrifice through the added sales of other merchandise to the customers thus attracted to their stores.

The other consistent price cutters are the cut-rate stores, which are a fairly recent commercial development. They may have had their origin with dealers who did not know how to figure their costs and who honestly felt that they did not need the normal margin of profit on a particular article. But the usual cut-rate store is not of this type. It uses the price-cut merchandise to attract customers to the store, and then derives its real profit, in one of two ways. The customer, deceived by the low price on the goods whose value he knows, may be persuaded to buy additional "bargain"

merchandise on which the dealer's margin of profit is in fact excessive. Another method is to persuade the customer to buy in the place of the cut-price goods, unknown and inferior brands at about the same price level but on which again the dealer is able to make an excessive margin of profit.

These cut-rate stores provide very stiff competition for the average retailer. They usually have inexpensive quarters and equipment. Indeed, they are commonly known as "pine board stores." They handle only fast-moving merchandise because they do not attempt to render complete service to the public; and for volume of sales they depend upon price rather than upon the continued goodwill of their customers.

It is generally conceded that the activities of price cutters lower the current sales price, and therefore the margin of profit, of every dealer in the vicinity. The public becomes familiar with the cut price and accepts it as a proper price for the goods. If a retailer does not meet the low price, he is thought to be making an excessive profit. If he does meet it, he sacrifices the profit he needs to sustain his business. If, because he cannot meet the price competition, he discontinues the sale of the goods, he risks the complete loss of his customers who will fill their other requirements at the place where they can buy the discontinued item.

(D) To the Consumer.

A primary consideration on questions involving restraint of trade or fair competition has always been the ultimate effect upon the welfare of the community and of the individual consumers who make up the community. The interest of the individual consumer is to get

merchandise of good quality at a fair price. The obvious premise is that if competition forces down prices of quality goods the consumer will benefit. But the known results of price cutting on trade require deeper analysis of the effect upon the consumer.

Price cutting is a practice peculiar to urban centers. Consider the situation of the average urban resident. He lives in a residential section at some distance from the main business and shopping center. Somewhere in this center he may buy anything he desires, from a new automobile to a headache tablet. But the headache tablet he wants when he has a headache, not when he happens to be in the shopping district. He lives in more or less limited quarters with little storage space for supplies which he may not need for a long time. So he likes to buy his supplies when and as his need arises, not when and as he can make a special shopping trip.

From these circumstances arise the neighborhood stores to serve his convenience. Prompt service because they are near, comparatively easy establishment of credit because he is personally known, quick availability of emergency items outside of shopping hours —all these are the factors of convenience and necessity that make the local store indispensable. But the local store cannot survive unless it can draw enough business from the neighborhood on a fair margin of profit to support it.

What happens when a cut-rate store comes into the neighborhood? The consumer is attracted to the new store by the prices of familiar products far below the standard price his usual dealer has charged. He feels that he is making a big saving—so he makes other purchases at the new store, too. He buys unknown and inferior goods on the assumption that they are also

bargains, and pays a price far in excess of their actual value. And while he is led away by the normal human love of a bargain, his old retailer is suffering from the loss of his business.

Eventually he wants something that the cut-rate store does not carry because it does not move fast enough, or wants some service that the cut-rate store will not give. Then he goes back to his old local dealer, but what does he find? Business has dropped off, so the retailer no longer carries the full stock in any line that he used to have. Some items have ceased to be profitable if he has to meet cut prices, so he no longer has them available at any price. Profits in general have decreased, so he can no longer render the service he used to give. The consumer finds himself cut off from any local source of supply and deprived of the easy accessibility which his living circumstances require. His cut-rate "savings" are swallowed up by the general injury to his comfort and welfare.

Moreover, the owners of independent stores, their families, their employees, their landlords, and all persons who supply their economic needs and desires comprise a large portion of those whom we loosely refer to as "consumers." Manufacturers of branded goods and their employees are also "consumers." The Fair Trade Acts have sound economic justification in their aid to these particular consumers as well as the protection they afford to all consumers by preventing practices which drive reputable products off the market and deception which facilitates both substitution and sales of over-priced goods.

The Existing Fair Trade Acts.

When these effects of price cutting began to be felt, there began immediately to be agitation for a remedy. The Miles decision cut off the most obvious plan, as affecting goods which passed in interstate commerce. The Colgate and General Electric plans were awkward, troublesome, and too expensive for the average manufacturer. Finally the States began to take an interest in the problem and to consider whether, within the scope of their jurisdiction over intrastate commerce, they could not find a remedy.

California was the first to take definite action. In 1931 it adopted a law which was amended in 1933 to strengthen its effectiveness. This California law has been used as a model for similar legislation elsewhere, and thirteen other States have adopted substantially identical laws: Illinois, Iowa, Maryland, New Jersey, New York, Oregon, Pennsylvania, Washington, Wisconsin, Ohio, Louisiana, Virginia, and Rhode Island. It is notable that these 13 States contain over half of the population of the United States.

Though some of these laws vary slightly in their provisions, they all provide for contracts between the producer and the distributor of identified merchandise, wherein the distributor's resale price is definitely fixed. The distributor may in turn contract with retail dealers for resale at a specified price. Thus the producer may fix the final resale price to the consumer. Selling or advertising the merchandise at less than the fixed price "wilfully and knowingly," *i. e.,* for a bad purpose, without justifiable excuse, is actionable by anyone injured thereby whether or not the price cutter is a party to the resale contract.

However, such contracts may be made only with re-

spect to goods which are in fair and open competition with other products of the same class made by others. And dealers in the same distribution group—as, for instance, two retailers—may not make resale price agreements with each other. Exceptions are made for resale at lower than contract prices in specified circumstances, such as in the case of damaged goods and bona fide close out sales.

New Jersey has another unfair trade law which was first adopted in 1913 and amended to its present form in 1915. It permits a manufacturer to fix resale prices by affixing a specified form of notice to his goods. Violation of the terms of the notice is actionable by any injured party. It has been little used until now but it may present a practical alternative for contracts under the general type of fair-trade act.

In Connecticut the California type of fair-trade act failed to pass, but a retail drug control act was adopted in 1935. It provides that (with specified exceptions) no drug retailer shall sell goods at a price below the manufacturer's wholesale list price per dozen or per unit, and a violating retailer is subject to a fine of $500.

The purpose and effect of the State fair-trade acts is not to fix or maintain prices on a high level. It is to enable a producer of trade-marked goods to protect his distribution by insuring a sustaining profit to his distributors, with consequent benefit to everyone.

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